

**UNITED STATES COURT OF APPEALS
FOR THE EIGHTH CIRCUIT**

**ANNEX MEDICAL, INC.; STUART
LIND, and TOM JANAS**

Appellants,

v.

Civ. No. 13-1118

KATHLEEN SEBELIUS, in her official capacity as Secretary of the United States Department of Health and Human Services; **HILDA SOLIS**, in her official capacity as Secretary of the United States Department of Labor; **TIMOTHY GEITHNER**, in his official capacity as Secretary of the United States Department of the Treasury; **UNITED STATES DEPARTMENT OF HEALTH AND HUMAN SERVICES; UNITED STATES DEPARTMENT OF LABOR; and UNITED STATES DEPARTMENT OF THE TREASURY,**

Appellees.

**APPELLANTS' OPPOSITION TO APPELLEES' MOTION TO
CONSOLIDATE**

Annex Medical, Inc. and Stuart Lind (collectively "Lind") oppose Appellees' motion to consolidate this case with *Frank R. O'Brien Jr., et al. v. HHS, et al.*, No. 12-3357. If the cases are consolidated, Lind will suffer unnecessary consequences including prejudice and delay because the cases are in fact materially distinguishable.

1. While the consolidation of cases is wholly at the discretion of the Court and since there is no rule Appellants Lind can identify to allow for the Appellees' (collectively "the Government") request to consolidate for purposes of oral argument, the Government's arguments and initiative raises an issue concerning real or perceived procedural advantages the Government seeks over Lind. Certainly the present posture of both cases are so remotely different that consolidation will hinder due process for the parties and possibly the clarity of the application of the law under different procedural standards of review because of an inadvertent "guilt-by-association" versus a distinction of facts and application of the law.

2. Keeping the Lind and *O'Brien* cases separated allows the Court to determine each on their own merits regarding differing procedural standards on the one hand, and on the other, in the case of *O'Brien*, allow the Court to separately adjudicate legal issues unrelated, not presented, and not interested to be pursued by Lind. Thus, consolidating the cases for the purpose of oral argument will not aid the Court. Here, Lind presents the Court with one claim: whether or not they are entitled to injunctive relief under their asserted Religious Freedom Restoration Act (RFRA) claim. *O'Brien* involves four different claims; the fifth *O'Brien* claim implicates RFRA. But although both Lind and *O'Brien* have one common RFRA claim, it does not of itself justify consolidation at oral argument since the two cases

present different facts that this Court will take into consideration under differing standards of review.

3. Importantly, the cases involve different standards of review. In *O'Brien*, the district court granted a motion to dismiss, which will be reviewed de novo. *See E-Shops Corp. v. U.S. Bank Nat'l Ass'n*, 678 F.3d 659, 662 (8th Cir. 2012). In Lind's case, the district court denied a motion for preliminary injunction, which will be reviewed for abuse of discretion, with the legal conclusions reviewed de novo. *See S.J.W. v. Lee's Summit R-7 Sch. Dist.*, 696 F.3d 771, 776 (8th Cir. 2012). The standards of review alone are materially distinguishable and have vastly differing applications of the law when considering the cases' respective factual settings.

4. The Government's motion points to two cases involving similar RFRA claims that were consolidated in the Seventh Circuit Court of Appeals. (Government's Motion at 3.) But, as the Seventh Circuit explained those two cases are "materially indistinguishable." *Grote v. Sebelius*, 2013 U.S. App. LEXIS 2112, 2 (7th Cir. Jan. 30, 2013). There, both cases involve an appeal of a denial of a preliminary injunction and both involve one (and the same) legal question. Neither of those elements is present here.

5. Additionally, this case and *O'Brien* are materially distinguishable in that the HHS Mandate burdens each set of plaintiffs in different ways. For example, the

O'Brien plaintiffs must “choose between violating their religious beliefs by purchasing a group health plan and paying large fines for failure to comply with the statute.” (Order Granting Injunction Pending Appeal at 3.) Not only does the HHS Mandate require Lind to violate his religious beliefs in order to offer a group plan, but as he explained to the district court and will explain here, “his religion compels him to purchase health insurance for Annex Medical’s employees.” (*Id.* at 6 n.3.) This religious directive requires special consideration that is not required for the resolution of the *O'Brien* case.

6. Consolidating the cases for the purpose of oral argument is prejudicial to Lind as it is likely to lead to confusion and delay. Importantly, *O'Brien* involves an appeal of a decision on the merits while Lind’s appeal is of a decision on preliminary relief. Necessarily, then, the disposition of the *O'Brien* case may require significant additional time and other consideration unrelated to Lind’s case as this Court determines if the district court erred in its decision on the merits. Determinations as applied to *O'Brien* are not necessary or informative to the question of whether Lind is entitled to preliminary relief. In fact, because the Court will consider multiple legal issues in *O'Brien*, it may decide the case based on legal or procedural deficiencies, or lack thereof, and not have to reach the RFRA claim. Thus, Lind’s opportunity to be heard in oral argument would be irreparably hindered both in the presentation of argument or delay in adjudication. Further,

consolidating the two cases with differing factual records may lead to inadvertent confusion either by the parties or (less likely) the Court. Regardless, Lind is more likely than not to suffer the consequences unnecessarily at the only opportunity to be heard. Conversely, consolidation places the Government in an advantageous position as it attempts to distill and combine these separate yet equally important factual and legal issues.

7. Therefore, if there is any perceived efficiency in the consolidation of the cases in oral argument, it is minute. However, the consequential harm to Lind outweighs the Government's desire to consolidate two materially distinguishable cases to accommodate its objectives while impinging upon Lind's right to petition this Court on his meritorious claims under standards applicable to preliminary injunctive relief.

Conclusion

For the foregoing reasons, the Appellants Annex Medical and Stuart Lind request this Court to deny Appellees' motion to consolidate the cases for oral argument.

Respectfully submitted this 22nd day of February, 2013.

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CERTIFICATE OF SERVICE

I hereby certify that on February 22, 2013, I electronically filed *Appellants' Opposition to Appellees' Motion to Consolidate* with the Clerk of the Court for the United States Court of Appeals for the Eighth Circuit by using the CM/ECF system. I certify that all participants in the case who are registered CM/ECF users will be served via the CM/ECF system. I certify that that following participants are not registered CM/ECF users and were served via the United States Postal System at the address noted below:

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